

FARRELL-COOPER MINING CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 87-417

Decided September 28, 1989

Petition for discretionary review of that part of a decision of Administrative Law Judge Michael L. Morehouse reducing a civil penalty assessment from \$2,600 to \$220. TU 6-13-P.

Affirmed in part; reversed in part; penalty of \$420 assessed.

1. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount

Under 30 CFR 845.13(b)(4)(i), from 1 to 10 points may be deducted in the assessment of a civil penalty where the person to whom the notice or order was issued achieved rapid compliance after notification of the violation. Rapid compliance requires that the person took extraordinary measures to abate the violation in the shortest possible time and that abatement was achieved before the time set. Where the only evidence relating to rapid compliance is that the violation was abated one day prior to the required time, the record does not support a deduction of any points for good faith.

2. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Negligence

Under 30 CFR 845.13(b)(3)(B), a violation which is caused by negligence shall be assigned 12 points or less, depending on the degree of negligence. Where an Administrative Law Judge assigns 12 points for negligence based on his finding that the degree of negligence was "insignificant," either that finding or the assignment of 12 points is inappropriate since "insignificant" negligence would necessarily warrant an assignment of substantially less than 12 points.

3. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Probability of Occurrence

An Administrative Law Judge's reduction of points from 13 to 1 for probability of occurrence based on a finding that the probability of occurrence of sediment leaving the permit area due to the failure to construct a sedimentation pond was insignificant will be affirmed on appeal where there is no evidence that sediment from the disturbed area had been carried off the permit area at the time of the OSMRE inspection and it was extremely doubtful that sediment would have been carried off the permit area prior to installation of the sedimentation pond which was approved, as part of a mining plan revision, on the date of the OSMRE inspection.

APPEARANCES: Paulette Andrud, Esq., Office of the Solicitor, Division of Surface Mining, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement; Thomas J. McGeady, Esq., Vinita, Oklahoma, for Farrell-Cooper Mining Company.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

On September 30, 1985, Office of Surface Mining Reclamation and Enforcement (OSMRE) Inspector Steven Colvert inspected Farrell-Cooper Mining Company's (Farrell-Cooper) Red Oak Mine (Permit No. 4028) located in southeastern Oklahoma. At that time, he issued Notice of Violation (NOV) No. 85-3-8-17 charging Farrell-Cooper with "failure to construct sedimentation ponds before beginning any surface mining activities in the drainage areas to be affected" (Exh. G-1). The inspector cited 30 CFR 936.17 (1987) and Oklahoma Permanent Regulatory Program Regulations 816.46(a)(1), (2), and (3) and 816.42(a)(5) in support of the violation. He required Farrell-Cooper to construct control structures in accordance with the regulations and have them certified by October 10, 1985. On the date of the inspection, Farrell-Cooper was, and had for a period of several months, been clearing trees from an area of approximately 35 acres in order to obtain material to construct a levee for flood control purposes. Both the levee and a sedimentation pond were the subject of a permit revision application filed by Farrell-Cooper. That application was approved on the same date as the OSMRE inspection.

Following issuance of a civil penalty assessment conference report establishing a civil penalty of \$2,600, Farrell-Cooper filed a timely petition for review of that civil penalty with the Hearings Division, Office of Hearings and Appeals. Administrative Law Judge Michael L. Morehouse conducted a hearing and on March 18, 1987, he issued a decision affirming the issuance of the NOV, but reducing the civil penalty from \$2,600 to \$220. OSMRE filed a timely petition for discretionary review of that part of Judge Morehouse's decision reducing the amount of the civil penalty, charging that he erred in deducting points for good faith, and in reducing the point

totals for negligence and probability of occurrence. Farrell-Cooper filed a brief in opposition to the petition and also a petition for an order vacating the notice of violation.

By order dated July 14, 1987, this Board granted OSMRE's petition. Therein, we made no mention of Farrell-Cooper's petition. That petition, however, clearly must be denied.

The method by which a party may challenge an order of an Administrative Law Judge disposing of a civil penalty proceeding is by petitioning the Board for discretionary review, pursuant to 43 CFR 4.1270. Such a petition must be filed within 30 days of receipt of the judge's order. 43 CFR 4.1270(b). There is no provision in the regulations for the filing of a petition to vacate a notice of violation. Therefore, we must consider Farrell-Cooper's petition to be a petition for discretionary review by the Board. However, Farrell-Cooper filed the petition with the Board on April 23, 1987, more than 30 days following the date of receipt (March 20, 1987) of Judge Morehouse's decision. For that reason, the petition was untimely, and we hereby deny it. Thus, the fact of violation is not in question before the Board, and we accept Judge Morehouse's ruling that the NOV was properly issued. The only issue for resolution is the propriety of Judge Morehouse's assignment of points leading to a reduction of the civil penalty.

Under the regulations in 30 CFR 845.13(b)(4), OSMRE may deduct as many as 10 points for good faith in attempting to achieve compliance. OSMRE allowed no deduction of points for good faith. Judge Morehouse found that 10 points should have been deducted for good faith based on his finding of rapid compliance. OSMRE ascribed 24 points under the negligence category, which Judge Morehouse reduced to 12, because he found the negligence to be "insignificant." Under the category of seriousness of the violation, OSMRE may assign up to 15 points for probability of occurrence and up to 15 points for extent of damage. OSMRE assigned 13 and 9 points, respectively. Judge Morehouse reduced the probability of occurrence points to 1 and the extent of damage points to 8. OSMRE disputes his reduction of the probability of occurrence points. OSMRE assigned a total of 46 points which, according to the table set forth at 30 CFR 845.14, converted to a penalty of \$2,600. Judge Morehouse reduced that total to 11, or a penalty of \$220.

OSMRE argues first that Farrell-Cooper is not entitled to any deduction of points for good faith. OSMRE challenges Judge Morehouse's conclusion that there was rapid compliance with the abatement directions of the inspector. Under 30 CFR 845.13(b)(4)(ii)(A), OSMRE may deduct from 1 to 10 points where the record shows rapid compliance, *i.e.*, "the person to whom the notice or order was issued took extraordinary measures to abate the violation in the shortest possible time and that abatement was achieved before the time set for abatement."

In this case, Farrell-Cooper was required to abate by October 10, 1985. The record shows that the sedimentation pond was completed on October 9, 1985, one day before the abatement date prescribed by the NOV (Tr. 52); however, the NOV was modified effective November 27, 1985, "[t]o extend the

abatement date to 8 a.m. December 29, 1985, 90 day mark" (Exh. A-3; Tr. 36). The modified NOV stated that the sedimentation pond had been completed and certified and "all but the NE 200 [feet] of the levee (required by the NOV) is constructed" (Exh. A-3). The record does not reveal the actual completion date of the levee.

Judge Morehouse provided no rationale for his ruling other than to conclude that "there was rapid compliance with the terms of the NOV" (Decision at 4). OSMRE contends that even though the sedimentation pond may have been completed prior to the time set for abatement, the NOV was later modified to allow an extension for completion of the levee. OSMRE argues that the assignment of 10 good faith points for partial abatement of a violation before the time set for abatement negates the motivational aspect of assigning good faith points.

[1] Clearly, where the regulations establish a range of points (-1 to -10) which are available for rapid compliance, an operator should not be entitled to the maximum deduction where the record shows only that abatement took place prior to the time set for abatement. 1/ The regulation defining rapid compliance requires evidence of both extraordinary measures and abatement prior to the time set. The assignment of points within that category is dependent upon evidence produced by the permittee to show that it took extraordinary measures which resulted in abatement of the violation before expiration of the required time. In this case, the only evidence presented at the hearing by Farrell-Cooper relating to good faith was its abatement of the violation one day before the required date. That evidence was insufficient to support a deduction of any points for rapid compliance. 2/ Accordingly, we must reverse Judge Morehouse's decision to the extent he deducted 10 points for "rapid compliance."

Next, OSMRE argues that Judge Morehouse erred in reducing the points assigned for negligence from 24 to 12. OSMRE charges that its original

1/ OSMRE's assertion that there was only a partial abatement must be rejected. In response to a question from counsel for Farrell-Cooper regarding whether the NOV was written for failure to construct a sedimentation pond or whether it included other structures, OSMRE Inspector Colvert testified that "[t]his violation was written because there were no sediment control structures catching the drainage from this -- from the disturbed area" (Tr. 34). Despite the statement in the modified NOV that the original NOV had required construction of the levee, the language of the NOV was limited to sedimentation control. Only the pond was for sedimentation control; the levee was for flood control (Tr. 24).

2/ While Farrell-Cooper argues at page 3 of its response to OSMRE's petition that it "diverted equipment from production in order to complete the sedimentation pond within the short abatement period originally allowed by Inspector Colvert," that assertion is not supported by any record evidence. Thus, Farrell-Cooper's attempt, before the Board, to show extraordinary measures in order to bolster Judge Morehouse's conclusion regarding rapid compliance must be rejected.

total of 24 points for negligence is supported by the record. In reducing the negligence points, Judge Morehouse stated:

OSMRE is directed to assign up to 25 points based on the degree of fault or negligence of the person or entity which caused the violation or failed to cure the violation. Here there is no question concerning the failure to correct, only the causative factor. It is clear from the testimony of Mr. [Brad] Baldwin [Farrell-Cooper's chief engineer] that the company anticipated that their application for revision of their mining plan regarding sedimentation control structures was going to be approved by the state and the company wanted to be sure they had adequate dry material available to construct the levee in the event that the material they planned to use became too saturated. This action was not inadvertent or unavoidable and therefore I find that there was at least an insignificant amount of negligence under the definition of the word in [30] CFR 845.13. Since the degree of negligence was insignificant, I assign 12 points under this category.

(Decision at 4).

[2] Thus, Judge Morehouse's conclusion that the points should be reduced from 24 to 12 was based on his finding that the degree of negligence in this case was "insignificant." The regulations define negligence as "the failure of a permittee to prevent the occurrence of any violation of his or her permit or any requirement of the Act or this Chapter due to indifference, lack or [sic] diligence or lack of reasonable care * * *." 30 CFR 845.13(b)(3)(ii)(B). The regulations provide that a violation which occurs through negligence "shall be assigned 12 points or less, depending on the degree of negligence." 30 CFR 845.13(b)(3)(i)(B). A greater degree of fault than negligence means reckless, knowing, or intentional conduct for which 13 to 25 points may be assigned depending on the degree of fault. 30 CFR 845.13(b)(3)(ii)(C); 30 CFR 845.13(b)(3)(i)(C).

We will first consider whether Farrell-Cooper's conduct involved a greater degree of fault than negligence, as alleged by OSMRE. Judge Morehouse's findings of fact are clear that Farrell-Cooper had applied to the State authorities for a revision of its mining plan to include the sedimentation pond and the levee. The area in question was stripped of vegetation in order to allow the soil to dry out so that it would be suitable for use as material to construct the levee upon approval of the mine plan revision. That approval occurred on the day the NOV was issued; however, the material from the cleared area ultimately was not used to build the levee. There is no question that Farrell-Cooper disturbed approximately 35 acres of land prior to establishing sedimentation controls and that its action was taken prior to approval of its permit revision.

We believe the record supports a finding that Farrell-Cooper's conduct did not involve a greater degree of fault than negligence. It may have failed to exercise reasonable care, but its conduct, under the circumstances, was not reckless.

Judge Morehouse's finding of "insignificant" negligence is, however, clearly inconsistent with his assignment of 12 points, since the point range for negligence is from 1 to 12. If the negligence were, in fact, "insignificant," less than 12 points would be appropriate. In this case, Farrell-Cooper was negligent. It should not have cleared the area in question until approval of its mine plan revision. Failure to do so exhibited a lack of reasonable care for which 12 points are properly assigned. Therefore, we reject Judge Morehouse's finding that the negligence was "insignificant," but we affirm his assignment of 12 points for negligence.

[3] OSMRE also takes issue with Judge Morehouse's reduction of the points for probability of occurrence from 13 to 1. The regulations at 30 CFR 845.13(b)(2)(i) provide for the assignment of up to 15 points based on the probability of the occurrence of the event which a violated standard is designed to prevent. In this case, the event in question is the potential occurrence of environmental harm from drainage leaving the permit area without passing through sedimentation control structures.

Judge Morehouse's stated his rationale for assessing 1 point as follows:

In this case, the area of the sediment pond being at a slightly lower elevation than the circled area was designed to collect such water as might flow from the circled area [disturbed area], which on the basis of this record is extremely unlikely, and the levy was to prevent any possible flooding that might occur from the permit area into Brazil Creek as well as to prevent flooding from Brazil Creek onto the permit area. On the basis of this record, I find the possibility of either occurrence to be insignificant and therefore assign 1 point under this category.

(Decision at 3-4).

The area disturbed by Farrell-Cooper's activity drains in a southeasterly direction toward Brazil Creek which meanders off the permit area. The purpose of the sedimentation pond, later approved as part of the permit revision, was to collect drainage in the area and protect Brazil Creek. OSMRE argues that the fact that a sedimentation pond was planned indicates the possibility of drainage off the permit. Moreover, OSMRE contends that witnesses for both parties testified that, without sedimentation control in place, drainage would flow into Brazil Creek (Tr. 28, 53). Specifically, Inspector Colvert testified that absent sedimentation control, water pollution off the permit was likely to occur. Hence, the assignment of 13 points, in accordance with 30 CFR 845.13(b)(2)(i), OSMRE urges, was appropriate. In finding the probability of occurrence insignificant, OSMRE argues, Judge Morehouse disregarded the testimony of witnesses from both sides.

OSMRE's argument, Farrell-Cooper contends, ignores the fact that the change in elevation between the disturbed area at issue and Brazil Creek is extremely slight. In fact, Inspector Colvert testified that the elevation in the location of the sedimentation pond was 525 feet, while the elevations

in the disturbed area ranged from 528 to 533 feet (Tr. 30). The fact that the area is relatively level is supported by photographs entered into evidence (Exhs. G-2 through G-5). In addition, Colvert testified that the disturbed area was separated from Brazil Creek by a grassland area (Tr. 13).

Based on our review of the record, we find support for Judge Morehouse's ruling that the probability of the occurrence of the harm in this case is insignificant. First, there is no evidence that the harm which the violated standard was designed to prevent had occurred at the time of the OSMRE inspection. Second, it appears that it would have been extremely doubtful that sedimentation from the disturbed area would have been carried into the creek and off the permit area prior to installation of the sedimentation pond which was approved, as part of the mine plan revision, on the date of the OSMRE inspection. Therefore, we affirm Judge Morehouse's reduction of the points for probability of occurrence from 13 to 1.

In summary, we reverse Judge Morehouse's deduction of 10 points for good faith; affirm, on other grounds, his assignment of 12 points for negligence; and affirm his assignment of 1 point for probability of occurrence. Thus, the total points in this case are 21, 1 for probability of occurrence, 8 for extent of damage, and 12 for negligence. In accordance with 30 CFR 845.14, 21 points translates to a penalty of \$420.

The imposition of a penalty, however, is discretionary where the point total is 30 or less. 30 CFR 845.12(c). In determining whether to assess a penalty in such a circumstance, the factors in 30 CFR 845.13(b) are to be given consideration. Judge Morehouse did not invoke his discretion and declined to assess a penalty, nor will we. Farrell-Cooper did not exercise reasonable care in clearing the 35-acre area of vegetation prior to approval of its mine plan revision. We believe imposition of a penalty is appropriate in this case. The difference between \$420 and the original amount assessed should be returned to Farrell-Cooper with interest. See 30 U.S.C. § 1268(c) (1982).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and reversed in part.

Bruce R. Harris
Administrative Judge

I concur:

James L. Burski
Administrative Judge